

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

JUSTIN BALLESTER,

Defendant.

**ORDER**

23 Cr. 204 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

In this action, Paragraphs 56 and 57 of the Presentence Report (“PSR”) state:

In November 2021, BALLESTER and [Co-Defendant Bruce] MELVIN committed a shooting against members of the rival Mac 10s gang in the vicinity of Morris Avenue in the Bronx, NY, during which no injuries were reported. In the moments leading up to the shooting, BALLESTER and MELVIN had engaged in a physical altercation with the rival gang members, during which MELVIN produced a firearm and discharged the weapon. The shooting was therefore not premeditated, and this incident constitutes attempted murder in the second degree.

In December 2021, BALLESTER committed a shooting in Dub City territory, during which no injuries were reported. The information available regarding the moments leading up to the shooting are unclear and therefore it does not appear that the shooting was premeditated. As such, this incident constitutes attempted murder in the second degree.

(PSR (Dkt. No. 149) ¶¶ 56-57)

The Probation Department cites to both shootings in calculating the applicable Guidelines range in the PSR. The PSR states that the November 2021 and December 2021 shootings (1) constitute attempted murder in the second degree pursuant to U.S.S.G. § 2A2.1(a)(2); (2) correlate with an offense level of 27; (3) constitute two separate groups pursuant to U.S.S.G. § 3D1.1; and (4) result in one unit apiece pursuant to U.S.S.G. § 3D1.4. (Id. ¶¶ 85-96, 103)

The facts alleged in the PSR regarding the November 2021 and December 2021 shootings are insufficient to support a finding that those shootings constitute attempted murder in the second degree. Moreover, the facts alleged regarding the December 2021 shooting are insufficient to support a finding that this offense was committed in furtherance of the charged racketeering conspiracy to which Ballester pled guilty. (Id. ¶ 25) These matters are material to the calculation of the applicable Guidelines range in the PSR because each shooting is treated as an individual racketeering act and as a separate “group” for Guidelines purposes.

The Government will make a submission by **July 12, 2024** providing a factual basis for its claim that (1) the November 2021 and December 2021 shootings constitute attempted murder in the second degree; and (2) the December 2021 shooting was committed in furtherance of the alleged Dub City racketeering enterprise.

Dated: New York, New York  
July 10, 2024

SO ORDERED.

A handwritten signature in black ink, reading "Paul G. Gardephe", written over a horizontal line.

Paul G. Gardephe  
United States District Judge